KIJAL RESORT SDN BHD A

v.

PENTADBIR TANAH KEMAMAN & ANOR

COURT OF APPEAL, PUTRAJAYA B
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: T-01-205-2009]
8 JULY 2013 C

LAND LAW: *Acquisition of land - Acquisition for public purpose - Acquisition to build access road - Proposed acquisition rejected three times - Attempt to acquire land succeeded at third time but unknown to proprietor of land - Declaration that land acquired for public purpose gazetted but proprietor not notified - Application for judicial review by proprietor to obtain certiorari order to quash decision of Land Administrator in allowing acquisition - Application for judicial review dismissed by preliminary objection - Appeal against dismissal of application - Land Acquisition Act 1960, s. 3(1)(a)* D E

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for - Application to quash decision of Land Administrator in allowing acquisition of land - Preliminary objection raised - Whether application made within time - Rules of the High Court 1980, O. 53 - Whether proper party named* F

The second respondent wished to build a hotel on a land and had applied to the Land Administrator ('the first respondent') to acquire part of the appellant's land to build an access road direct to the second respondent's land. Two attempts were made to acquire part of the land but were rejected. Unbeknown to the appellant, a third attempt was made by declaring that it was required for public purpose under s. 3(1)(a) of the Land Acquisition Act 1960 ('the Act'). A declaration to acquire the land ('Form D') was gazetted but was never served nor notified to the appellant and nine months later, the appellant was served with Form E to attend a land inquiry by the first respondent. The first respondent proceeded to serve Form H, which constituted the decision to reject the appellant's request that the acquisition be stayed or withdrawn and to proceed with the acquisition by making the award. The appellant then applied to the High Court for judicial review and to obtain an order of certiorari to quash G H I

the decision of the first respondent. At the hearing, the second respondent raised two preliminary objections against the application, namely (i) the application was not made within time as prescribed by O. 53 of the Rules of the High Court 1980 ('RHC') as it was filed more than 40 days after the decision to acquire was gazetted in Form D; and (ii) the proper party, which was the State Authority, was not named as a party. The application was dismissed by the High Court. Hence, the present appeal against the preliminary objections raised in the High Court. It was further submitted that the High Court judge erred in law and in facts in failing to consider that the failure by the first respondent to make and serve an award in Form H within two years on the appellant after Form D was gazetted was contradictory of s. 8(4) of the Act and thereby rendered the declaration of acquisition gazetted to lapse, cease, terminate and of no effect.

Held (dismissing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The High Court did not err in sustaining the preliminary objection. The appellant's grievance was not so much on the award itself but the acquisition. The objection by the appellant, at all times, was in respect of the acquisition of its land, not the quantum of the award itself. (para 9)

(2) Since it was a decision to acquire that was challenged, the challenge was against the decision of the State Authority, by virtue of s. 8 of the Act. Since the Act is, subject to compensation, the legislation that empowers a State Authority to deprive a person of his property, its provisions must be adhered to strictly. If a power is stated to be with the State Authority, it could not be exercised by another. An action could not be taken against another for the exercise of its power by the State Authority. The Act only provides that the Land Administrator acts upon the decision of the State Authority to hold inquiry for the hearing of claims to compensation for all interests in such land. An action against the decision of the State Authority could not name the Land Adminisitrator. (paras 11 & 12)

(3) The two year time frame applied to the making of the award in Form G under s. 14(1) and not the giving of the notice in Form H under s. 16 of the Act. Therefore, the first respondent had acted well within the two year time frame from the date of Form D. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua bercadang untuk membina sebuah hotel di atas sebidang tanah dan telah memohon kepada Pentadbir Tanah ('responden pertama') untuk mengambil sebahagian daripada tanah perayu untuk membina jalan masuk ke tanah responden kedua. Dua percubaan dibuat untuk mengambil sebahagian tanah tersebut tetapi telah ditolak. Tanpa diketahui oleh perayu, percubaan ketiga telah dibuat dengan mengisytiharkan bahawa tanah tersebut diperlukan bagi tujuan awam di bawah s. 3(1)(a) Akta Pengambilan Tanah 1960 ('Akta'). Satu pengisytiharan untuk mengambil tanah tersebut ('Borang D') diwartakan tetapi tidak disampaikan mahupun dimaklumkan kepada perayu dan sembilan bulan kemudian, perayu disampaikan dengan Borang E untuk menghadiri siasatan ke atas tanah tersebut oleh responden pertama. Responden pertama seterusnya menyampaikan Borang H, yang mana merupakan keputusan untuk menolak permohonan perayu agar pengambilan tersebut ditangguhkan dan untuk meneruskan dengan pengambilan dengan memberi award. Perayu kemudiannya memohon kepada Mahkamah Tinggi bagi semakan kehakiman dan untuk mendapatkan satu perintah *certiorari* untuk membatalkan keputusan responden pertama. Semasa perbicaraan, responden kedua membangkitkan dua bantahan awalan terhadap permohonan tersebut, iaitu (i) permohonan tersebut tidak dibuat dalam masa yang ditetapkan oleh A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana ia difailkan lebih 40 hari selepas keputusan untuk mengambil diwartakan dalam Borang D; dan (ii) pihak yang sepatutnya, iaitu Pihak Berkuasa Negeri, tidak dinamakan sebagai pihak. Permohonan tersebut ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan ini terhadap bantahan awalan yang dibangkitkan di Mahkamah Tinggi. Dihujahkan selanjutnya bahawa Mahkamah Tinggi khilaf, dari segi undang-undang dan fakta, kerana gagal mempertimbangkan bahawa kegagalan responden pertama untuk membuat dan menyampaikan award dalam Borang H dalam masa dua tahun kepada perayu selepas Borang D diwartakan, adalah bercanggah dengan s. 8(4) Akta dan oleh itu, menyebabkan pengisytiharan pengambilan yang diwartakan luput, terhenti, tamat dan tiada kesan.

Diputuskan (menolak rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi tidak khilaf dalam mengekalkan bantahan awalan. Ketakpuashatian perayu bukanlah seberapa pada award itu sendiri tetapi pada pengambilan tersebut. Bantahan oleh perayu, pada setiap masa, adalah mengenai pengambilan tanah tersebut, bukan kuantum award itu sendiri.

(2) Memandangkan keputusan untuk mengambil yang dicabar, cabaran adalah terhadap keputusan Pihak Berkuasa Negeri, di bawah s. 8 Akta. Oleh kerana Akta adalah tertakluk kepada pampasan, undang-undang yang memberi kuasa kepada Pihak Berkuasa Negeri untuk menafikan seseorang akan hartanya, peruntukan-peruntukannya mesti dipatuhi dengan ketat. Jika kuasa dinyatakan terletak pada Pihak Berkuasa Negeri, ia tidak boleh dijalankan oleh yang lain. Satu tindakan tidak boleh diambil ke atas yang lain bagi perjalanan kuasa oleh Pihak Berkuasa Negeri. Akta hanya memperuntukkan bahawa Pentadbir Tanah bertindak mengikut keputusan Pihak Berkuasa Negeri untuk mengadakan siasatan bagi perbicaraan tuntutan pampasan bagi semua kepentingan ke atas tanah. Satu tindakan terhadap keputusan Pihak Berkuasa Negeri tidak boleh menamakan Pentadbir Tanah.

(3) Had masa dua tahun terpakai bagi pembuatan award dalam Borang G di bawah s. 14(1) dan bukan penyampaian notis dalam Borang H di bawah s. 16 Akta. Oleh itu, responden pertama telah bertindak dalam had masa dua tahun dari tarikh Borang D.

Case(s) referred to:
Arthur Ponniah Gurubatham & Satu Lagi lwn. Pentadbir Tanah Wilayah Persekutuan [2008] 3 CLJ 17 HC ***(refd)***
Ee Chong Pang & Ors v. The Land Administrator of The District Of Alor Gajah & Anor [2013] 3 CLJ 649 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 18
Land Acquisition Act 1960, ss. 3(1)(a), 8(1), (4), 14(1), 16
Rules of the High Court 1980, O. 53 r. 3(6)

For the appellant - Bahari Yeow; M/s Lee Hishamuddin Allen & Gledhill
For the first respondent - Noorbahari Baharuddin; State Legal Advisor
For the second respondent - Bastian Vendargon (PK Nathan & Gene Vendargon with him); M/s Bastian Vendargon

[Appeal from High Court, Kuala Terengganu; Judicial Review No: 13-01-2008]

Reported by Najib Tamby

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Kijal Resort Sdn Bhd had applied to the High Court for judicial review and to obtain an order of *certiorari* to quash the decision of the Land Administrator to acquire under s. 3(l)(a) of the Land Acquisition Act 1960 ('LAA 1960') of part of Lot 3168, Mukim Kijal, Daerah Kemaman, Negeri Terengganu registered in the name of the appellant. The application was dismissed by the High Court.

The Appeal Against Preliminary Objections

[2] At the hearing, two preliminary objections were raised on behalf of the second respondent:

(a) The application was not made within time under O. 53 of the Rules of the High Court 1980; and

(b) The proper party, the State Authority, was not named as a party.

The First Preliminary Objection

[3] Order 53 r. 3(6) of the RHC 1980 provides that an application for judicial review shall be made promptly, and in any event, within 40 days from the date when grounds for the application first arose, or when the decision is first communicated to the applicant.

[4] The second respondent submitted that the appellant's application on 6 January 2008 for leave to initiate judicial review was filed more than 40 days after the decision to acquire was

A gazetted on 21 July 2005 in Form D. The appellant responded that its application was not in breach as it was filed within 40 days of Form H which was served only on 27 November 2007.

[5] The critical aspect is whether the "decision" that is made the B subject of the application for leave is:

(a) the decision to acquire under s. 8 of the LAA 1960 gazetted on 21 July 2005 in Form D; or

(b) the award under s. 16 of the LAA 1960 notice of which was C served on 27 November 2007 in Form H.

[6] It is provided by s. 8(1) of the LAA 1960 that it is the State Authority who makes decisions as to acquisition for a public purpose:

D

> (1) When the State Authority decides that any of the lands referred to in s. 7 are needed for any of the purposes referred to in s. 3, a declaration in Form D shall be published in the Gazette.

E **[7]** The publication in the Gazette is public notice to all persons: see s. 18 Interpretation Acts 1948 and 1967 (Consolidated And Revised 1989) Act 388. This is the operative provision with regard to the notification of the decision to acquire for a public purpose.

F **[8]** On the other hand, concerning the service of notice on 27 November 2007 relied upon, pertains to the award made. It is provided under s. 16 of the LAA 1960 that:

> (1) On making any award under subsection 14(1) in respect of G any scheduled land the Land Administrator shall prepare and serve on each person interested in such land a notice in Form H.
>
> (2) Every notice in Form H shall include an extract from the written award of the Land Administrator in Form G, relating H to the land in which the person to whom such notice is addressed has an interest.

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[9] Examination of the statement shows the appellant's grievance was not so much the award itself but the acquisition. The objection by the appellant at all times was in respect of the acquisition of part of its land, not the quantum of the award itself. This is evident from the appellant's summary of facts before us:

(i) The Appellant is the registered owner of Lot PT No. 2851, 1727, 3165 and 3168 ... and has obtained various approvals to develop the land. The surrounding mangrove jungle has also been earmarked for eco-tourism.

(ii) The 2nd Respondent is the owner of Lot 33 who wished to build a hotel thereon. In 1994, the 2nd Respondent applied to the 1st Respondent to acquire part of the Appellant's land in Lot PT No. 3168 to construct an access road direct into the 2nd Respondent's land.

(iii) By a letter dated 24.7.1997, the State Economic Planning Unit, ("UPEN"), rejected the proposed acquisition to be improper on various grounds including that this proposed acquisition is solely for the purpose of the advantage of the 2nd Respondent and there were already access roads to the 2nd Respondent's land.

(iv) On a second letter by UPEN dated 10.2.1998 to the 2nd Respondent, UPEN reiterated its position in its letter dated 24.7.1997 in rejecting the 2nd Respondent's application for the proposed acquisition on the basis that the proposed access road direct into the 2nd Respondent's land is indeed not necessary.

(v) Sometime between 1999 and 2000, the 2nd Respondent made a second attempt to acquire the Appellant's land for the same purpose under s. 3(1)(b) LAA 1960.

(vi) In subsequent meetings, it was apparent that the 2nd Respondent's insistence on the acquisition was to enable it to avoid making any contribution towards infrastructure and maintenance costs of the existing access roads.

(vii) By letter dated 20.8.2001, the Appellant was informed by Pejabat Tanah, Kemaman, that Majlis Mesyuarat Kerajaan Negeri ("MMKN") had rejected the 2nd Respondent's second attempt acquisition.

(viii) Unknown to the Appellant, a third attempt was made to acquire the subject land, this time by declaring that it was required for a public purpose under s. 3(l)(a) LAA 1960.

(ix) Form D (a declaration to acquire the land) was published in the gazette on 21.7.2005 but this was never served nor notified to the Appellant.

(x) On 7.3.2006 (some 9 months later), the Appellant was served with Form E to attend a land enquiry by the Pentadbir Tanah Daerah ("PTD"). The Form E was not appended with a Form D. To date, the Appellant had not been served with Form D.

(xi) The Appellant wrote protest letters to the 1st Respondent and to the MB's office to stay 1st Respondent's inaction during that period led the Appellant to believe that its request/protest for the acquisition to be withdrawn was being resolved between these state government agencies.

(xii) The 1st Respondent subsequently served upon the Appellant a notice of award in Form H dated 27.11.2007. This was 2 years 4 months after the declaration in Form D was gazetted.

(xiii) Form H constituted the 1st Respondent's decision to reject the Appellant's request that the acquisition be stayed/withdrawn and to proceed with the acquisition by making the award. The Appellant rejected the award and filed this Application for Judicial Review against the 1st Respondent's decision.

(xiv) On 20.5.2008, the Appellant's application for leave for Judicial Review was allowed.

(xv) On 21.06.2009, the Appellant's Application for Judicial Review was dismissed and hence this appeal by the Appellant.

[10] We conclude, therefore, that the High Court did not err in sustaining this preliminary objection.

The Second Objection

[11] The second objection, that the State Authority was not named as a party relates directly to the question addressed earlier above. Since it is the decision to acquire that is challenged, that challenge is against the decision of the State Authority under s. 8 of the LAA 1960.

[12] Since the Land Acquisition Act 1960 is, subject to compensation, legislation that empowers a State Authority to deprive a person of his property, its provisions must be adhered to strictly (see *Ee Chong Pang & Ors v. The Land Administrator of The District Of Alor Gajah & Anor* [2013] 3 CLJ 649 CA. If a power is stated to be with the State Authority, it cannot be exercised by another. On the face of it, it appears that it follows that an action cannot be taken against another for the exercise of its power by the State Authority. The LAA 1960 only provides that the Land Administrator acts upon the decision of the State Authority to hold inquiry for the hearing of claims to compensation for all interests in such land. An action against the decision of the State Authority cannot name the Land Administrator.

[13] We conclude that the High Court did not err in sustaining the second objection.

Consequential Aspects

[14] It was submitted for the appellant that the learned judge erred in law and in facts in failing to consider that the failure by the first respondent to make and serve an award in Form H within two years on the appellant after Form D was gazetted is contradictory to s. 8(4) of the LAA 1960 and thereby renders the declaration of acquisition published in the Gazette on 21 July 2005 (Form D) to lapse, cease, terminate and of no effect.

[15] Section 8(4) of the LAA provides:

> (4) A declaration under subsection (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under subsection 14(1) within the said period of two years, and, accordingly, all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect.

[16] The two year time frame applies to the award under s. 14(1). This latter section provides:

> (1) Upon the conclusion of the enquiry under s. 12 relating to any scheduled land the Land Administrator shall prepare a written award under his hand in Form G, in which he shall, in respect of each separate area of scheduled land, make a separate award in respect of each person whose interest in the land has been established in such enquiry.

[17] On the other hand, Form H that the appellant relies upon is the notice of that award of the Land Administrator, and containing an extract thereof. Section 16 of the LAA 1960 provides:

> (1) On making any award under subsection 14(1) in respect of any scheduled land the Land Administrator shall prepare and serve on each person interested in such land a notice in Form H.
>
> (2) Every notice in Form H shall include an extract from the written award of the Land Administrator in Form G, relating to the land in which the person to whom such notice is addressed has an interest.

[18] We conclude the two year time frame applied to the making of the award in Form G under s. 14(1) and not the giving of the notice in Form H under s. 16. See *Arthur Ponniah Gurubatham & Satu Lagi lwn. Pentadbir Tanah Wilayah Persekutuan* [2008] 3 CLJ 17. Since the award in Form G was made on 3 August 2006, the first respondent had acted well within the two year time frame from the date of From D, 21 July 2005.

[19] Accordingly, we dismissed the appeal and sustained the preliminary objections with costs RM20,000 to the first respondent and RM10,000 to the second respondent, and ordered the deposit be refunded.